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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 632

JOSEPH SCALZA, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 30, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The petitioner, Joseph Scalza, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on August 2, 1965.

OPINION BELOW

The opinion of the Court of Appeals, dated August 2, 1965, is not yet reported. It is reprinted in the Appendix hereto, p. 1a, *infra.*

JURISDICTION

Following a jury trial, the petitioner Scalza was found guilty on October 29, 1964, on a charge of conspiracy to violate § 501(c) of the Landrum-Griffin Act, in the United States District Court for the Southern District of New York. On November 6, 1964, he was sentenced to five years' imprisonment and fined $5000.

The Court of Appeals for the Second Circuit affirmed the judgment of conviction on August 2, 1965, and a timely petition for rehearing was denied on September 1, 1965. This petition for writ of certiorari is filed within 30 days following that denial.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the use by a union officer of union-authorized increases in his salary and expense accounts for payment to others in connection with union merger negotiations constitutes an embezzlement, stealing, abstracting or conversion of union funds within the meaning of § 501(c) of the Landrum-Griffin Act.

STATUTORY PROVISIONS INVOLVED

Section 501(c), Labor Management Reporting and and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. § 501(c):

> Any person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

The general conspiracy statute, 18 U.S.C. § 371, provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

The relevant facts, viewed in the light most favorable to the Government, may be summarized as follows:[1]

On June 16, 1964, an amended single-count indictment was filed, charging seven individual defendants with having engaged in a conspiracy to violate § 501(c) of the Landrum-Griffin Act. It was charged that the purpose of the conspiracy was to embezzle, steal, abstract and convert to their own use and to the use of others moneys and other assets of certain labor organizations, of which some of the defendants were officers or employees. These labor organizations were identified as Local 229 of the United Textile Workers of America (hereinafter called the Textile Local), its unaffiliated successor New York City District Council 77 (hereinafter called the Independent Local), and Local 819 of the International Brotherhood of Teamsters (hereinafter called the Teamsters Local). S. App. 15a.

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[1] The record references in this petition are symbolized as follows:

Tr.—Stenographic transcript of trial testimony.

S. App.—Petitioner Scalza's printed appendix in the court below.

Govt. App.—Government's printed appendix in the court below.

Basically, the alleged conspiracy was divided by the indictment into two separate parts. The first part, which entailed nearly three-fourths of the trial testimony, dealt with the activities of certain defendants in using fraudulent expense vouchers and payroll dummies to embezzle funds from the Textile Local and the Independent Local during the period of 1957 through 1961. See pars. 3 and 4 of the indictment, S. App. 16a. All of the money so acquired by these fraudulent devices allegedly was used personally by certain defendants other than the petitioner Scalza. Indeed, the Government made no claim and there is no evidence that the petitioner Scalza had anything whatever to do with the affairs of those two locals or with the embezzlements therefrom.

Significantly, the original indictment that had been filed on October 24, 1963, made no mention at all of the petitioner Scalza or of the affairs of the Teamsters Local.[3] Not until the amended indictment was filed on June 16, 1964, adding a fifth paragraph and two additional overt acts, was petitioner Scalza in any way charged with being involved in the alleged conspiracy. Almost as an afterthought, the new fifth paragraph of the amended indictment alleged that, quite apart from the original and renewed charges involving embezzlements from the Textile Local and the Independent Local,

> It was further a part of said conspiracy that moneys from the treasury of a labor organization,

[3] Based upon testimony given before a grand jury, Scalza had been indicted for perjury in denying that he had in fact collected for and paid money to one Burton Hyman after or in connection with the merger of the Independent Local with the Teamsters Local. The essence of this charge was then incorporated into par. 5 of the amended conspiracy indictment.

> to wit, Local 819 International Brotherhood of Teamsters, would be paid to certain officers and employees of said labor organization as salary and expense allowances and would be reflected as such on the books and records of said labor organization while, in truth and in fact, the moneys so appropriated were and would be paid over to certain of the defendants and co-conspirators. [S. App. 16a].

At the trial, the evidence showed that the petitioner Scalza had been in the labor movement for 20 years, had never been convicted of a crime, and was married and had three sons. Tr. 2383, 1941. In January of 1961 he was hired as an organizer for the Teamsters Local. At that time the Teamsters Local had only about 150 members and desperately needed to enlarge its membership in order to survive. Tr. 1947.

In the meantime, the membership of the Independent Local, which was the successor to the Textile Local, was being decimated by raids engineered by other unions and needed the support and strength of a strong international, such as the Teamsters. Tr. 215, 216. And so in December of 1961 the Independent Local made overtures to the Teamsters Local to affiliate with it in order to obtain the benefit of the vast resources of the Teamsters international and thereby effectively resist the raiding forays of other unions. Tr. 1939-43, 1884-85.

In an effort to expand the membership of the Teamsters Local, petitioner Scalza went to its secretary-treasurer, Maurice O'Connor, and asked him if he would "help in the campaign he was about to wage on the membership of Local 77 [the Independent Local]." Tr. 1945, 1946. O'Connor agreed to assist in Scalza's campaign to achieve a merger with the Inde-

pendent Local. In January of 1961 Scalza and O'Connor on two different occasions addressed the executive board of the Independent Local in an attempt to convince the board members that "they could have more protection if they belonged to an international union" rather "than an independent union." Tr. 1945.

Additionally, in that month of January, petitioner Scalza was asked to attend a meeting at the Polyclinic Hospital in New York City, where he was told that before certain persons influential in the Independent Local would recommend such a merger they would have to be paid $210 a week.[3] Tr. 1946

The merger of the Independent Local with the Teamsters Local meant enlarging the membership of the latter by approximately 900 members. With the dues set at $4 per member, this merger would produce additional revenue to the Teamster Local of about $3600. Tr. 1951.

The petitioner Scalza and O'Connor then went back to a meeting of the seven-man executive board of the Teamsters Local to present their "case." Tr. 1945. After hearing Scalza and O'Connor, the board voted and authorized an increase of $20 each in Scalza's and O'Connor's weekly salaries, together with a weekly expense account of $50 to each of them; in addition, the employment of Scalza's son at a salary of $70 a week was authorized. These various amounts totalled $210 a week. Tr. 1953-55. There is no evidence and the Government has never claimed that these authorized adjustments in the salary and

[3] The meeting took place in the hospital room of Sol Cotliar, who was ill and confined to the hospital. Cotliar was one of alleged co-conspirators.

expense accounts were in any way unreasonable. And the evidence was uncontradicted that Scalza, O'Connor and Scalza's son worked full time for the Teamsters Local after these authorized adjustments were made. S. App. 69a.

The Government's version of this critical transaction concedes the union's authorization of the additional salary and expense items totalling $210 a week. In its brief (p. 12) to the Court of Appeals, the Government stated:

> It was, therefore, agreed [between Scalza and O'Connor] that the $210 commitment would be met by placing Scalza's son, Richard, on the payroll of the union at $70 a week; by voting both Scalza and O'Connor an expense account of $50 per week; and by increasing the salaries of O'Connor and Scalza by $20 each week, for a total of $210. It was also decided that the necessary salary and expense account adjustment be voted at an executive board meeting (T. 1953-55). Upon the formal ratification of the executive board, Scalza began delivering the $210 to Hyman each week (T. 1948-55). He continued to do so for a period of months (T. 185-86, 1960-63).

This acknowledgement was made even clearer in a subsequent portion of the Government's brief (pp. 24-25) in the court below:

> The fact that payments continued after O'Connor ceased to be an employee of the union, was a clear indication that the commitment [to pay $210 a week] was the obligation of the Union and not the personal obligation of Scalza and O'Connor, who were merely agents for the delivery of the sums embezzled and that title to these funds never passed to Scalza and O'Connor.

Thus the Government's theory of the case was that the embezzlement or taking took the form of payments

from the union to an outsider (Hyman), with Scalza and O'Connor being merely intermediaries.

The Government produced no evidence and made no allegation or claim that the $210 payment was not used for the union purpose of helping effectuate the merger of the Independent Local with the Teamsters Local. The indictment itself (S. App. 16a) charged only that "the moneys so appropriated were and would be paid over to certain of the defendants and co-conspirators"—without negativing the fact that the payments were in connection with the union merger.

All of the weekly $210 payments were made in a rather surreptitious fashion to Hyman, no part of them being retained for the personal use of Scalza or O'Connor. Hyman thereafter recommended to the Independent Local that it join the Teamster Local. Tr. 754. Upon Hyman's urging, the executive board of the Independent Local voted overwhelmingly to affiliate with the Teamsters Local and the merger was duly consummated. Tr. 764.

At the conclusion of the trial, the court charged the jury as to the contents of § 501(c) of the Landrum-Griffin Act and defined each of the crimes specified therein—embezzling, stealing, abstracting and converting. S. App. 85a-86a. But the instruction made no reference to any requirement that under any of those specified crimes the taking must be without the knowledge or consent or authorization of the organization or person from which the funds are taken.[4] S. App. 76a-

[4] Scalza's counsel specifically excepted to the failure to include in the definition of abstraction the requirement that it be without the knowledge or consent of the organization or person from which the funds are being abstracted, citing *United States* v. *Northway*, 120 U.S. 327, 334. S. App. 110a.

110a. Nor was any standard given the jury for determining what is or is not a legitimate union purpose in the use of union funds. The judge, however, did charge that:

> An essential element of each of the definitions stated is that the money, funds, property or other assets alleged to have been stolen, embezzled, abstracted or converted must have belonged to a labor organization and not to the one charged with misappropriation thereof. [S. App. 86a.]

Finally, near the conclusion of the charge, the judge instructed as follows:

> Section 501(c) of the Landrum-Griffin Act does not prohibit any union officer or employee from using his bona fide salary in any manner he or she may see fit nor does it prohibit the use of bona fide expense accounts in furtherance of union interests. However, if funds charged on union books to either salary or expense accounts which are taken from the union for private, personal purposes and not expended in furtherance of the interests of the general union membership, or if union payrolls and salaries are falsified and manipulated so as to provide funds from the union treasury for non-union purposes, such conduct is unlawful and in violation of Section 501(c) of the Landrum-Griffin Act. [S. App. 97a.]

In the appeal from the petitioner's conviction, the Court of Appeals for the Second Circuit, commenting on the jury charge, held:

> The court did not say to the jury explicitly or by far-fetched inference that it would be a violation of section 501(c) as a matter of law if a union employee used his salary for his own private or personal purposes. The court made it abundantly

clear that section 501(c) "does not prohibit any union officer or employee from using his bona fide salary in any manner he or she may see fit nor does it prohibit the use of bona fide expense accounts in furtherance of union interests." What is prohibited is the charging on the union books of false and fictitious items under the guise of legitimate salary or expense accounts.

REASONS FOR GRANTING THE WRIT

The decision below raises a critical and novel question as to the proper interpretation and application of § 501(c) of the Landrum-Griffin Act. The inherent importance of the question, combined with the substantial impact of the answer upon the internal operations of all labor organizations in the United States, justifies full review of the case by this Court.

The broad ruling of the court below that § 501(c) prohibits "the charging on the union books of false and fictitious items under the guise of legitimate salary and expense accounts" (p. 7a, *infra*) reflects, particularly in light of the facts of this case, a most questionable and danger-laden reading of § 501(c). That ruling stemmed from a record which, viewed most favorably to the Government, showed (1) a union, impoverished of members, engaged in a desperate effort to induce another local to amalgamate with it, (2) union approval, through executive board action, of additional personnel and of increased salaries and expense accounts for its officers in order to assist this effort to expand its membership, and (3) use by the officers of these authorized increments to make payments to certain other individuals thought to be influential in securing the consent of the other local to the proposed merger.

The statutory problem is whether this use by officers of such authorized salary and expense account increases in order to help achieve the union's goal of amalgamation constitutes the kind of action which § 501(c) was designed to outlaw. To label the ultimate payments made to others by the union officials as immoral or reprehensible in nature, or even as illegal under some law not here involved, contributes nothing to the solution of the § 501(c) problem. Section 501(c), by its own terms, is concerned solely with the union officer or employee "who embezzles, steals, or unlawfully and wilfully abstracts or coverts to his own use, or the use of another," any of the moneys or assets of the union which he serves.

This statutory language must be read and applied in light of the fact that the Landrum-Griffin Act, while imposing various limitations and sanctions on unions and their officers, was not intended by Congress as an open invitation to juries and judges to render their own uninhibited judgments as to the morality or even the legality of any and all union expenditures. Consistent with the carefully delineated proscription of specified practices, Congress intended the widest possible preservation of union practices and internal procedures. As has been said on another occasion by the Second Circuit, *Gurton* v. *Arons*, 339 F. 2d 371, 375 (C.A. 2):

> The provisions of the L.M.R.D.A. [Landrum-Griffin Act] were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the operations of of unions which would justify a broad power to interfere. The internal operations of unions are to be left to the officials chosen by the members to

manage those operations except in the very limited instances expressly provided by the Act. The conviction of some judges that they are better able to administer a union's affairs than the elected officials is wholly without foundation. Most unions are honestly and efficiently administered and are much more likely to continue to be so if they are free from officious intermeddling by the courts. General supervision of unions by the courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations.

But the broad and confused reading given § 501(c) in this case invites the "officious intermeddling" in the internal affairs of unions which the *Gurton* decision condemned and permits indiscriminate speculation by juries into the bona fides of all union financial transactions. Without bothering to analyze the undisputed facts or their statutory implications, the court below apparently accepted the Government's theory of the case that the union purpose so dominated the transaction that the "commitment" to pay the $210 per week to Hyman "was the obligation of the union and not the personal obligation of Scalza and O'Connor . . . Scalza and O'Connor were merely agents for the delivery of the sums embezzled and . . . title to these funds never passed to Scalza and O'Connor."[5] Thus, under the court's holding, every payment or commitment by a union to a third person is a potential or real embezzlement, at least if the transaction is improperly entered on the union books in the form of salary or expense items. And such a payment is apparently an embezzlement even though the union's governing body author-

[5] Govt. Brief, p. 25, in Court of Appeals.

ized or approved the transaction and the bookkeeping techniques.[6]

No limitations or standards were imposed on the jury's inquiry into the bona fides of this union transaction. More particularly, the court below has in no way limited § 501(c) and the jury inquiry thereunder to those "false and fictitious" items which are entered (1) without the express authorization of the union itself and (2) without any real or arguable relationship to a legitimate union purpose.

Yet without such limitations, the whole thrust of § 501(c) is altered. It becomes a threat which Congress never intended, a threat to all unions and union officers that what some jury or judge may conceive to be a false or improper accounting procedure may result in an embezzlement or conversion conviction. Such a threat may well inhibit the pursuit of lawful and constitutional union objectives. In this very case, the evidence demonstrated that the Teamsters Local was seeking additional membership and amalgamation with the Independent Local. It was thereby pursuing a fundamental and protected right to organize and expand and to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 of the Labor-Management Relations Act, 29 U.S.C. § 157.

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[6] Suppose, for example, that as a price for securing the amalgamation of the Independent Local Hyman requested that he be put on a pension from the Teamsters Local after the amalgamation, in light of his many years of service to the Independent Local. The Teamsters Local approves the request and "improperly" debits the pension payments to Scalza's expense account. Under the court's theory of § 501(c), there would appear to be an embezzlement by Scalza for the use of Hyman.

When a union engages in the pursuit of such basic rights and authorizes the expenditure of certain items to aid in that pursuit, courts must take care that § 501(c) or any other federal criminal statute is not so broadly interpreted as to inhibit those rights. Cf. *Smith* v. *California*, 361 U.S. 147, 155.[7] Properly interpreted and applied, the proscriptions of § 501(c) can be made effective without such an inhibitory effect. By limiting the concepts of embezzlement, stealing, abstracting and conversion to those takings that are unauthorized by the union and serve only private rather than union purposes, the inhibitory effect is removed.

Moreover, Congress has made plain the precise extent of its concern with improper financial transactions by unions and the remedies it believes are adequate to treat with such "false and fictitious" union accounts. Section 501(a) of the Landrum-Griffin Act provides certain fiduciary standards for union officers and agents in the administration of union finances; and violations of those standards are made the subject of damage suits and accountings pursuant to the provisions of § 501(b). In addition, Congress in Title II of the Act has created a comprehensive scheme for the reporting and review of union financial statements—including items entered as salaries, expense allowances and other "direct and indirect allowances." Sec. 201. Any false statement or representation, or any wilful concealment, in such reports subjects the

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[7] In the *Smith* case, this Court warned that obscenity statutes must be so framed and applied as not to have "a tendency to inhibit constitutionally protected expression." As was said in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433, "The threat of sanctions may deter . . . exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions."

union officials to criminal sanctions, including imprisonment up to one year. Sec. 209.[8]

To read § 501(c) as confined to unauthorized takings for purely private purposes is not only consistent with the general rule favoring strict construction of criminal statutes but is required if due respect is to be paid to all the interrelated provisions and titles of the Landrum-Griffin Act. See *Calhoon* v. *Harvey*, 379 U.S. 134, 139-140. Section 501(c) simply was not meant to be the equivalent of or a substitute for the financial standards imposed on unions and union officers by § 501(a) or § 201. And there is no practical or legal justification for expanding the interpretation of § 501(c) so as to overlap those other provisions. Cf. *Gilbert* v. *United States*, 370 U.S. 650, 658.

In other words, § 501(c) is a straight-forward embodiment of proscriptions that have always been a part of our general criminal jurisprudence—an outlawry of surreptitious, unauthorized takings of money or property of a person or organization for one's own private use, or the private use of another. The statutory concepts of embezzlement, stealing, abstracting and conversion all have long-standing meanings that possess that common feature of unauthorized takings for private usage. See *Moore* v. *United States*, 160 U.S. 268, 269-270; *Grin* v. *Shine*, 187 U.S. 181, 189; *Morissette* v. *United States*, 342 U.S. 246, 271-273;

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[8] The penalty for violation of § 501(c) includes imprisonment up to five years; violation of the conspiracy statute, 18 U.S.C. § 371, is also punishable by imprisonment up to five years. Petitioner in this case was sentenced to five years imprisonment. Thus the court below has in effect escalated the one-year offense specified by § 209 into a five-year penalty.

United States v. *Turley*, 352 U.S. 407, 411-413.[9] And when Congress enacted § 501(c) it was merely making federal offenses, insofar as union officers and employees are concerned, out of what has always been outlawed under state law, to wit, the unauthorized takings for private use which are encompassed by the specified crimes.[10] See also *United States* v. *Harmon*, 339 F. 2d 354, 357 (C.A. 6).

But when union moneys or assets are given to bona fide union officers or employees, for their own use or the use of others, *pursuant to union authorization and in accordance with some legitimate union purpose*, the very essence of those long established criminal concepts disappears. That vacuum is not filled by evidence of surreptitiousness in payment, or even impropriety in bookkeeping entries.

It should be noted, finally, that neither the issue presented nor the propriety of granting review is

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[9] In *United States* v. *Northway*, 120 U.S. 327, 334, this Court noted that, to constitute the crime of abstracting, "it is necessary that the moneys and funds should be abstracted from the bank without its knowledge and consent, with intent to injure or defraud it . . ."

In *Grin* v. *Shine*, 187 U.S. 181, 189, it was said that "it is impossible for a person to embezzle the money of another without committing a fraud upon him."

[10] Senator Kennedy made it plain that § 501(c) does no more than make "embezzlement by any person of funds or assets of a labor organization a Federal crime." Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Titles I-VI, p. 1038.

Senator Goldwater pointed out that "Embezzlement of any kind is already a crime in every State and Territory of the United States, and there is no evidence that these local laws are not being properly enforced. This provision gives union members nothing they do not already have." *Ibid.*, p. 1014; see also p. 1079.

affected by the fact that this is a conspiracy conviction. The petitioner Scalza was tried and convicted on the theory that he was a member of a general conspiracy which had various objects, including the alleged taking of money from the Teamster Local treasury. But the only conceivable connection between Scalza and the alleged conspiracy was his activities with respect to the Teamster Local finances through his salary and expense account increases. Those are the activities that create the issue in this case; and if those activities do not constitute a crime under § 501(c) the verdict as respects the petitioner cannot stand.[11]

Certiorari should accordingly be granted to restore § 501(c) to its true, limited meaning. Only this Court's action can remove the threat to all labor unions imposed by the decision below. Only then can unions safely pursue their legitimate goals without fear that the propriety of their financial transactions will later be second-guessed in criminal proceedings that are not designed for that purpose.

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[11] If there be thought to be any other ground upon which the petitioner's conviction can be justified, the conviction clearly could not be sustained under the rule which "requires a verdict to be set aside in cases where the verdict is supportable on one ground but not on another and it is impossible to tell which ground the jury selected." *Yates* v. *United States*, 354 U.S. 298, 311-312. See also, *Stromberg* v. *California*, 283 U.S. 359, 367-368; *Williams* v. *North Carolina*, 317 U.S. 287, 291-292; *Cramer* v. *United States*, 325 U.S. 1, 36, n. 45; *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284.

CONCLUSION

For these various reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 30, 1965

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 428—September Term, 1964.

(Argued May 3, 1965 Decided August 2, 1965.)

Docket No. 29384

UNITED STATES OF AMERICA, *Appellee*,

—against—

EDWARD BRILL, SOL COTLIAR, BURTON HYMAN and JOSEPH SCALZA, *Appellants*.

Before: MOORE, SMITH and HAYS, *Circuit Judges*.

Appeal by defendants, Burton Hyman, Sol Cotliar, Edward Brill and Joseph Scalza, from judgments of conviction entered in the Southern District of New York after a trial before George H. Boldt, *Judge*,* and a jury for conspiracy to violate section 501 (c), Title 29, United States Code.

Affirmed.

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* Of the Western District of Washington, sitting in the Southern District of New York by designation.

GERALD H. ABRAMS, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney, Southern District of New York, John E. Sprizzo, Assistant United States Attorney, of counsel), *for Appellee.*

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FREDERICK J. LUDWIG, New York, N. Y. (Sharf, Mackell & Hellenbrand, Kew Gardens, N. Y., of counsel), *for Appellant, Joseph Scalza.*

MOORE, *Circuit Judge*:

The defendants, Burt Hyman, Sol Cotliar, Edward Brill and Joseph Scalza appeal from judgments of conviction by a jury upon an indictment* charging them and other co-conspirators with conspiring to violate section 501(c) of Title 29, United States Code in that they embezzled, stole and converted to their own use and the use of others, funds of labor organizations, namely, Local 229, United Textile Workers of America and Local 819, International Brotherhood of Teamsters.

In general, the basis of the conspiracy was the abstraction of funds from the union treasuries by means of false vouchers and fictitious salary payments to persons who performed no services for the unions. These funds were

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* The indictment was filed on June 16, 1964, and superseded an indictment filed on October 24, 1963.

then wrongfully diverted to the use of the defendants and others.

Although the scheme had many ramifications, in essence, and as revealed by the bookkeeper, Joan Kane, it involved the issuance of false expense vouchers and fictitious salary checks to provide for an excess of $210 a week over the actual union expenses. The participation of the convicted defendants therein was $50 to Brill and $160 (delivered in two envelopes containing $100 and $60) to Cotliar. Hyman, a former officer of Local 229, directed transmission of the funds. Scalza was the president of Local 819. The merger of Local 77 (formerly Local 229) with Local 819 is of significance only in that the merger negotiations and its consummation required the perpetuation of the fraudulent scheme. Insofar as more specific facts are required in dealing with the errors alleged by the individual defendants they will be stated subsequently.

Cotliar—Sufficiency of the Evidence

Cotliar contends that the Government did not prove that he *knowingly* entered into or participated in the conspiracy and that he is a victim of guilt by association. Although there was testimony that for some fifteen months commencing in late 1959 Cotliar had been given envelopes which had been delivered by Kane to Levin (a former business partner of Cotliar), Cotliar argues "that the mere fact that he allegedly received some of the fruits of the conspiracy does not lead to any legitimate inference that he received it because he had a 'stake in the venture'." His conclusion is that without further proof the jury was required "to make any one of a number of inferences completely consistent with innocence." Cotliar's explanation of the adverse jury result is that it "came about through errors in the admission of evidence * * * and through the innuendo loaded questions consistently asked of witnesses throughout the trial."

The evidence claimed to have been erroneously admitted against Cotliar was primarily Scalza's grand jury testimony given on September 24, 1963. Cotliar argues that Scalza's grand jury testimony, and inferentially the adverse testimony of the other conspirators was inadmissible on the ground that the Government failed to present independent evidence to link him to the conspiracy. This argument is answered by Kane's testimony that she left envelopes for "Solly" and by Levin's testimony that Cotliar picked up these envelopes.

Cotliar argues that Scalza's testimony before the grand jury was inadmissible hearsay as against him since it was given after the conspiracy to divert union funds had been completed. Although Cotliar asserts that the conspiracy ended in mid-November 1962, there was evidence that payments were continued at least into early 1963. Nor was there any definite termination date placed by the conspirators upon the $210 monthly obligation. Admissibility, therefore, might well be based upon continuation of the conspiracy. However, it is unnecessary to invoke any particular theory because the defendant whose testimony—introduced through a reading of the grand jury minutes—is attacked as heresay actually took the stand to describe his version of the events. In so doing he subjected himself to cross-examination, thus removing any disadvantage Cotliar might have suffered from not being able to cross-examine in the grand jury room. Moreover, Scalza's testimony at trial covered much the same ground as his testimony before the grand jury and his answers did not deviate materially from those given to the grand jury. Scalza's testimony at trial, therefore, cannot be classed as a hearsay declaration made after termination of the main conspiracy or as concerned primarily with events which took place after the main conspiracy had terminated. That Cotliar's counsel elected not to question Scalza was an exercise of judgment on his part, although at variance with the decisions of counsel for the other three defendants who did cross-examine.

The jury was entitled from all the acts revealed by the testimony to determine whether Cotliar knowingly participated in the conspiracy to embezzle union funds. Was he merely the owner of a bookstore and the unwitting recipient of mysterious envelopes? Or was he more closely affiliated with the other defendants as might be inferred from his frequent appearance at union headquarters, his discussions as to union problems, the meeting with Scalza and Hyman in his hospital room where the "sale" of Local 77 was consummated and where continuing wrongful payments by officers of Local 819 were agreed upon, the undercover method of delivering the envelopes and his inquiries as to whether anything had been left for him? Furthermore, the jury might well have considered for inference purposes why after FBI investigation had commenced did Cotliar want to "get rid of this mess" and not "want any part of it". From these and other facts, the jury could have found in Cotliar's favor; it did not do so. Absent error in the admission or exclusion of testimony or error in the charge, its verdict must stand because it is not the function of the reviewing court to replace the jury's determination where properly admitted testimony would warrant the result reached.

Levin's Claim of Fifth Amendment Privilege

Levin was an important witness because it was he who testified that Kane gave him the envelopes which Hyman was sending to "Sol" (Cotliar) and which he, in turn, delivered to Cotliar. On the Government's direct examination, Levin was asked about his grand jury appearance and disclosed that he had invoked his rights under the Fifth Amendment and had refused to testify before that body. Cotliar's counsel thereupon moved for a mistrial which motion was denied. Subsequently, counsel on cross-examination brought out the fact that Levin had been threatened with indictment but had been told that he would not be indicted if he testified at trial for the Government. Cotliar

argues that the irresistible inference from this testimony is that Levin was guilty and knew of his guilt; therefore, his former business associate, Cotliar, to whom he delivered the envelopes, must also be guilty. Such inferences are always possible where a co-defendant pleads guilty and testifies for the Government. Under such circumstances it is usually standard trial procedure to seek to attack the witness' credibility by showing the advantage he hopes to receive by so doing. Likewise, if there be a criminal record, "it is usually proper and desirable that the party calling a witness with a criminal record should elicit such information on direct examination." *United States* v. *Freeman*, 302 F. 2d 347, 350 (2 Cir., 1962). The cases upon which Cotliar relies, *Grunewald* v. *United States*, 353 U. S. 391, 415-424 (1957) (*defendant's* use of the Fifth Amendment in prior grand jury testimony used to impeach his credibility at trial); *United States* v. *Gross*, 276 F. 2d 816 (2 Cir., 1960), *cert. denied*, 366 U. S. 935 (1961) (*defendant's* use of the Fifth Amendment in prior testimony before a Congressional committee also used to impeach his testimony at trial); and *United States* v. *Tomaiolo*, 249 F. 2d 683 (2 Cir., 1959) (*defense witness'* use of Fifth Amendment in his prior testimony before grand jury used to impeach his credibility at trial), involve substantially different situations and do not support the proposition that facts affecting credibility of a friendly witness cannot be developed on direct examination within reasonable limits. Nor was the disclosure that Levin was testifying under a grant of immunity in any different category. There was no error in the admission of this testimony.

Scalza—The Charge

Scalza creates his two major appellate points out of a completely specious conception of one sentence of the court's charge. The court did not say to the jury explicitly or by far-fetched inference that it would be a violation of section 501(c) as a matter of law if a union employee used

his salary for his own private or personal purposes. The court made it abundantly clear that section 501(c) "does not prohibit any union officer or employee from using his bona fide salary in any manner he or she may see fit nor does it prohibit the use of bona fide expense accounts in furtherance of union interests." What is prohibited is the charging on the union books of false and fictitious items under the guise of legitimate salary or expense accounts. No further answer is required to such a gross misconception and interpretation of a charge which clearly placed the essential elements of the crime before the jury.

The Motion for a Severance

Scalza's involvement stems from his employment in January 1961 as an organizer for Local 819. In July 1961 he became its president. In the merger negotiations in early 1962 designed to place the membership of Local 77 into Local 819, the condition was imposed of continuing the $210 a week payments after the merger. There was testimony that this was arranged by placing Scalza's son, Richard, on the union's payroll at $70 a week, authorizing $50 each to Scalza and O'Connor, then the secretary-treasurer of Local 819, as expenses and by increasing their salaries by $20 a week—a total of $210. This amount ($210) Scalza delivered to Hyman.

Although Scalza was only added as a defendant in the June 16, 1964 indictment, he was alleged in this indictment to have "participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses" with his co-defendants within the meaning of Rule 8(b) of the Federal Rules of Criminal Procedure. The propriety of the trial court's denial of the motion for severance was confirmed by the sufficiency of the evidence introduced at trial which linked Scalza to the continuing conspiracy which was the subject of the indictment. *Schaeffer* v. *United States*, 362 U.S. 511, 514 (1962). There was no error in denying his motion for a severance.

The Demand for a Bill of Particulars

The decision upon the demand for a bill under the previous perjury indictment did not deprive the trial court of its right to exercise discretion upon the demand under the conspiracy indictment. No reversible error can be attributed to the denial of this motion.

Hyman

This appellant adopts all points raised by his co-appellant Cotliar (Points II and III) and the other co-appellants insofar as applicable. The same conclusions set forth in this opinion as to the alleged hearsay statements after the asserted termination of the conspiracy and the admission of the testimony of Levin apply with equal force as to Hyman.

Brill

Brill concedes that the proof discloses that he, as a union employee, participated in a scheme whereby persons who did not in fact work for the union were placed on the payroll, their checks endorsed and cashed by Kane and the proceeds delivered to one or more of the co-defendants. These payroll "dummies" were then discharged after twenty weeks so that they would be eligible for New York State unemployment insurance. Brill places his claim of reversible error upon an incident during the trial and upon an alleged defect in the charge.

The "currency" incident

This incident occurred when counsel for Hyman, desirous of obtaining a stipulation that an envelope delivered to Levin was "what is known as a regular size envelope" received a reply from the prosecutor, "Can we stipulate that it is about the size of currency?" A motion for a mistrial followed which was denied but the trial court struck the prosecutor's "currency" reply and instructed the jury to

disregard it. The ensuing colloquy, much out of the hearing of the jury, showed no prejudice on the part of the trial judge against Brill's (or the defendants') case. It was merely an effort to preserve courtroom decorum—an effort which often appears in retrospect to have greater appellate importance than during the heat of battle. As to the remark itself, the jury could not have been so naive and unfamiliar with American currency as not to be able to form its own opinion as to whether American bills would fit into the envelope in question. Whether or not this were so would have been fair argument to the jury by any of the parties. Nothing was, therefore, brought to the jury's attention that their own eyesight and common sense would not have revealed.

The Charge

Error in the charge is claimed because of the court's asserted failure to connect the elements of the crime of conspiracy with the elements of the crime specified in section 501(c). Brill concedes that the charge contained excellent discussions of elements of both crimes but contends that the court did not state that the jury must find beyond a reasonable doubt that "the object of the conspiracy was to commit the acts which constitute a violation of section 501(c)." The court first referred to the indictment as charging the defendants "with wilfully, knowingly and unlawfully conspiring to embezzle or convert to their own use or to the use of others in violation of section 501(c) funds or other assets of certain labor organizations ..." and that it alleged "that the object of the conspiracy was the violation of Section 501(c)." The court then specifically charged that the jury must find beyond a reasonable doubt that each defendant "knew of the existence and unlawful objective of the alleged conspiracy and that he had the specific intent to assist the conspiracy in attaining that objective." Section 501(c) so far as material was read to the jury thus informing it of the essential elements of the

crime. A fair reading of the charge leaves no doubt that the jury was adequately advised that they must find that the object of the conspiracy was to steal and embezzle union funds in violation of section 501(c).

The record is replete with evidence from which the jury could have satisfied itself beyond a reasonable doubt that these defendants were brazenly and illegally using their respective positions to loot the union treasuries by schemes and devices which were most reprehensible.

The judgments of conviction are affirmed.